SUPREME COURT, U. S.

MAY 16 1969

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1289

DANIEL MORIN and JANET MORIN,

Petitioners,

—versus—

VICTOR S. GARRA, FELIX H. VANN, and WILLIAM C. SOULE, co-partners,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF FOR RESPONDENTS IN OPPOSITION

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Opinions Below

The opinions below are adequately set forth in the Petition.

Jurisdiction

The respondents submit that the Court lacks jurisdiction to grant the petition on the ground that petitioner

failed to present the constitutional issues in the procedural manner provided by the laws of New Jersey and that the decision below rests upon an independent and adequate state ground. The basis for these contentions is set forth below in the Argument.

Questions Presented

I. Whether the Court has jurisdiction to grant the petition.

A. Has petitioner failed to comply with State procedural requirements in presenting the constitutional issue to this Court.

B. Whether the opinion below rests upon an independent and adequate state ground.

II. Whether the issues presented are better directed to the Legislatures of the various states for consideration.

III. Whether the decision in *Griswold* v. *Connecticut* should be applied to the issues in this case.

Statute Involved

It is respondents' position that no statute is involved in the case before the Court.

Statement of the Case

This case involved an appeal from the entry of judgment on the pleadings or summary judgment. Plaintiffs alleged medical malpractice because of a failure by physicians to advise an expectant mother of the possibility of a therapeutic abortion. The trial court ruled that this complaint was controlled by *Gleitman* v. *Cosgrove*, 49 N. J. 22, 227 A. 2d 689 (1967), and, accordingly, no cause of action existed.

Petitioner's "Statement of the Case" is a curious piece, totally inappropriate to an appellate brief. Throughout this part of the brief, as well as the argument portion, there is reference to facts which were neither alleged nor proven at the trial level of this litigation. The only pleadings before the trial court were the complaint, the answer, the pretrial order, and briefs of the opposing attorneys, none of which contained the "Statement of the Case" petitioner now seeks to put before this Court.

The complaint consists of nine counts, listing the infant and his mother and father as plaintiffs. In paragraph one of the first count it is alleged, and was admitted, that the defendant Garra was a licensed practicing physician in New Jersey, with offices in Rochelle Park and hospital associations. Paragraph two alleges that the defendants Vann and Soule were physicians, specializing in obstetrics and gynecology with offices in Englewood and hospital associations. This was admitted. The third paragraph of the first count of the complaint alleges that on July 4, 1964, Mrs. Morin visited Dr. Garra and engaged him to provide medical services regarding her pregnancy and a rash "at that time". In Dr. Garra's answer he concedes that he saw Mrs. Morin on a certain occasion. Paragraph two of the second count alleges that on August 5, 1964, Mrs. Morin visited Dr. Soule to engage him and Dr. Vann in connection with her pregnancy. These defendants conceded in their answer that they undertook to treat the mother on certain occasions. There also appears in the complaint allegations that the female plaintiff later bore the infant plaintiff. There are no other factual allegations in the complaint.

The charge in the complaint of failure by the defendants to carry out a legal duty owing to the plaintiffs is that the defendants had a duty

> "to inform the female plaintiff of the serious risk and possible serious hazard in her condition. . . . to afford the female plaintiff an opportunity of being informed so that she might intelligently elect a course of therapy, so that no harm would come to the female plaintiff or her unborn child. . . ."[1]

Plaintiffs also allege in the complaint that the defendants warranted that the pregnancy would be all right.

There are also derivative claims by the parents.

At the pretrial conference plaintiffs further specified their legal claim. The crucial allegations against the defendants are listed in plaintiff's pretrial memorandum which was made part of the order. There it is stated that the defendants:

> ". . . failed and neglected to warn the female plaintiff of the high probability that harm would come to her unborn fetus as a result of her being inflicted with rubella during the first trimester of her pregnancy, and did fail to recommend abortion as an indicated and proper course of treatment, so that harm did come to her unborn fetus arising out of such failure and negligence of this defendant . . ."[2]

Based upon the indistinguishable case of *Gleitman* v. *Cosgrove, supra,* defendants moved for judgment on the pleadings pursuant to R.R. 4:12-3 and for summary judgment pursuant to R.R. 4:58-1 *et seq.*

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[1] Appendix to Appellant's brief in the Superior Court of New Jersey, Appellate Division, p. 5a.

[2] Appendix to Appellant's brief in the Superior Court of New Jersey, Appellate Division, p. 22a.

Defendant's motion was granted by the Honorable Paul R. Huot on November 17, 1967.[3] Clearly in his oral opinion, Judge Huot recognized the controlling effect of the *Gleitman* decision and in so ruling noted that no cause of action existed.

ARGUMENT

I.

The Court lacks jurisdiction to grant the petition.

A. Petitioners failed to comply with State procedural requirements in presenting the constitutional issues to this Court.

It is essential to the jurisdiction of the Supreme Court under 28 U. S. C. A. §1257(3)[4] that a substantial federal question be properly raised in the State court proceedings. *Beck* v. *Washington*, 369 U. S. 541, 550-54 (1962), reh. den. 370 U. S. 965 (1962). In general, the litigant is compelled to follow applicable state procedures in raising the federal question and failure to do so is fatal to Supreme Court review. This is true even where the highest State Court is silent on the federal question. The Supreme Court assumes, without an affirmative showing to the contrary, that

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[3] Appendix to Petition, p. 4a-6a.

[4] "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . . .

(3) By writ of certiorari, . . . where . . . any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

the silence is due to a procedural deficiency. *Bailey* v. *Anderson,* 326 U. S. 203 (1945), reh. den. 326 U. S. 691 (1945).

A review of petitioner's attempt to present a federal issue to this Court through the New Jersey courts demonstrates the failure to comply with applicable state procedural rules. When plaintiff appealed to the Appellate Division of the New Jersey Superior Court, the brief filed by appellants raised no constitutional claim nor made any constitutional arguments.[5] Indeed, the Petition for Certification to the New Jersey Supreme Court raised no constitutional issue before that Court.[6] Only when petitioner filed a Supplemental Petition for Certification were constitutional issues brought to the attention of the Court.[7] The petition was denied without opinion on December 10, 1968.

This procedure does not comply with New Jersey rules relating to the presentation of issues before the New Jersey Supreme Court. Our highest Court has stated that it can consider only those questions presented to and passed upon by the Appellate Division of the Superior Court, *Gibralter Factors Corp.* v. *Slapo,* 23 N. J. 454, 129 A. 2d 567 (1957), app. dis. 355 U. S. 13 (1957); *Salisky* v. *City of Garfield,* 132 N. J. L. 144, 39 A. 2d 70 (E. & A. 1944). The failure of petitioner to perfect or even discuss any constitutional issues before the Appellate Division would effectively constitute a waiver of any constitutional claim to New Jersey's highest Court.

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[5] See Appellant's Brief in the Superior Court of New Jersey, Appellate Division.

[6] See Petition for Certification to the Supreme Court of New Jersey.

[7] See Supplemental Petition for Certification to the Supreme Court of New Jersey.

Moreover, it is clear that the New Jersey Supreme Court did not consider the constitutional claim as properly before it. The Rules of the New Jersey Supreme Court have been held to mandate consideration of properly presented constitutional claims. N.J.R.R. 1:10-4(e); *Tidewater Oil Co.* v. *Mayor etc. of the Borough of Carteret,* 44 N. J. 338, 209 A. 2d 105 (1965). Therefore, the Supreme Court implicitly ruled that a proper constitutional question was not before it by denying the Petition for Certification.

This failure to proceed according to State practice which has been acknowledged by the New Jersey Supreme Court itself, is fatal to the petition to this Court. This defect is jurisdictional, and it would appear the constitutional claim asked to be decided by the New Jersey Supreme Court was a mere afterthought. Such practice is not condoned in this court as stated in *Oxley Stave Co.* v. *Butler County,* 166 U. S. 648, 655 (1897):

> "the jurisdiction of this Court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right."

Clearly, the present record demonstrates otherwise. After failing to appeal any constitutional question to the Appellate Division of the Superior Court of New Jersey, failing to petition to the Supreme Court of New Jersey on the basis of a constitutional question, can petitioner now be heard to say that State procedures have been satisfied or that the New Jersey Courts have been given a chance to rule on a constitutional issue? The obvious negative response demands the present petition be denied for lack of jurisdiction.

B. The opinion below rests upon an independent and adequate state ground.

It is unquestioned that the Supreme Court will not review a state court judgment based upon an adequate and independent non-federal ground, even though a federal question might have been involved and perhaps wrongly decided. *Fox Film Corp.* v. *Muller,* 296 U. S. 207 (1935); *Wilson* v. *Loew's Inc.,* 355 U. S. 597 (1958). So firm is this principle that after a case has been accepted for review and during oral argument it first becomes apparent that the case accepted for review rests upon an adequate state ground, the writ of certiorari will be dismissed. *Wilson* v. *Loew's Inc., supra.*

An analysis of the instant matter and of *Gleitman* v. *Cosgrove, supra,* upon which the trial court relied in deciding this matter, demonstrates convincingly that in fact the decision of the Court rests solely upon an adequate and independent state and common law ground.

At the trial level the Court granted defendants' motion for summary judgment which was premised upon the controlling effect of the New Jersey Supreme Court's decision in *Gleitman* v. *Cosgrove, supra.* The Court stated at the outset of its oral opinion granting defendants' motion with reference to the *Gleitman* case:

> "I will agree that this be disposed of by the Supreme Court."[8]

The Appellate Division of the New Jersey Superior Court affirmed the Trial Court's decision in a *per curiam* opinion which held that "the appeal was controlled by the

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[8] See Appendix in Petition at p. 4a.

decision in *Gleitman* v. *Cosgrove*, 49 N. J. 22 (1967).[9] The New Jersey Supreme Court denied the Petition for Certification.

The instant matter then was decided upon the controlling effect of *Gleitman* v. *Cosgrove, supra,* applying the common law principle of *stare decisis.* Therefore, petitioners are actually asking this Court to review the earlier decision of the New Jersey Supreme Court in *Gleitman* v. *Cosgrove, supra.*

Initially respondents question whether this is proper under the Supreme Court's procedural guidelines. The only issue in the instant matter is whether the Trial Court correctly applied the common law doctrine of *stare decisis.* The Appellate Division held that it had and the case was not certified by the New Jersey Supreme Court.

Petitioners attempt to circumvent the obvious non-constitutional issue involved in the instant matter by questioning the constitutionality of the case relied upon by the Trial Court and Appellate Division. This respondent submits this is contrary to the court's practice of not permitting the party seeking review to challenge rights effectively belonging to another. See *Hanson* v. *Denckla,* 357 U. S. 235, 244 (1958); *Barrows* v. *Jackson,* 346 U. S. 249, 255-59 (1953).

However, not conceding the right, it is still abundantly clear that *Gleitman* itself rests upon an independent and adequate state ground. That ground is best stated in the language used by the Court itself. As to the infant's cause of action, the court stated:[10]

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[9] See Appendix in Petition at p. 2a.

[10] We recognize that petitioner now raises only the parents claim but the New Jersey Courts held the parents claim to be derivative and the controlling state social policy was set forth in consideration of the infant's claim.

"The infant plaintiff is therefore required to say not that he should have been born without defects but that he should not have been born at all. In the language of tort law he says: but for the negligence of defendants, he would not have been born to suffer with an impaired body. In other words, he claims that the conduct of defendants prevented his mother from obtaining an abortion which would have terminated his existence, and that his very life is 'wrongful.'

The normal measure of damages in tort actions is compensatory. Damages are measured by comparing the condition plaintiff would have been in, had the defendants not been negligent, with plaintiff's impaired condition as a result of the negligence. The infant plaintiff would have us measure the difference between his life with defects against the utter void of nonexistence, but it is impossible to make such a determination. This Court cannot weigh the value of life with impairments against the nonexistence of life itself. By asserting that he should not have been born, the infant plaintiff makes it logically impossible for a court to measure his alleged damages because of the impossibility of making the comparison required by compensatory remedies. As a recent commentator put the matter:

> '[N]o comparison is possible since were it not for the act of birth the infant would not exist. By his cause of action, the plaintiff cuts from under himself the ground upon which he needs to rely in order to prove his damage' Tedeschi, "On Tort Liability for 'Wrongful Life'," 1 Israel L. Rev. 513, 529 (1966).

> The two cases from other states which have considered the theory of action for 'wrongful life' were brought by illegitimate children for damages caused by their birth out of wedlock, and in both cases policy reasons were found to deny recovery. Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N. E. 2d 849 (App. Ct. 1963), cert. denied 379 U. S. 945, 85 S. Ct. 444, 13 L. Ed. 2d 545 (1964), and Williams v. State of New York, 18 N. Y. 2d 481, 276 N. Y. S. 2d 885, 223 N. E. 2d 343 (Ct. App. 1966)
>
> We hold that the first count of the complaint on behalf of Jeffrey Gleitman is not actionable because the conduct complained of, even if true, does not give rise to damages cognizable at law." 49 N. J. at pp. 28-29.

With reference to the parent's claim, the Court also held against them on common law tort grounds.

> "The mother and father stand in a somewhat different position from the infant. They are equally subject to the factual circumstance that no act by the defendants could have decreased the likelihood that the infant would be defective. However, Mrs. Gleitman can say that an abortion would have freed her of the emotional problems caused by the raising of a child with birth defects; and Mr. Gleitman can assert that it would have been less expensive for him to abort rather than raise the child.
>
> A considerable problem is raised by the claim of injury to the parents. In order to determine their compensatory damages a court would have to evaluate the denial to them of the intangible, unmeasurable, and complex human benefits of motherhood and fatherhood and weigh these against the alleged

> emotional and money injuries. Such a proposed weighing is similar to that which we have found impossible to perform for the infant plaintiff. When the parents say their child should not have been born, they make it impossible for a court to measure their damages in being the mother and father of a defective child.
>
> Denial of the claim for damages by adult plaintiffs is also required by a close look at exactly what it is they are here seeking. The thrust of their complaint is that they were denied the opportunity to terminate the life of their child while he was an embryo. Even under our assumption that an abortion could have been obtained without making its participants liable to criminal sanctions, substantial policy reasons prevent this Court from allowing tort damages for the denial of the opportunity to take an embryonic life." 49 N. J. at pp. 29-30.

As noted above, the Court did not reach the question of the constitutionality of the statute or base its decision upon its effect. The Court explicitly set out that it was not necessary to do so.

> "In the view we have taken of the case we need not consider whether the abortion which plaintiffs were denied the opportunity to obtain would have been illegal. Our statute provides criminal sanctions for abortions which are performed 'without lawful justification.' N.J.S. 2A:87-1 and see N.J.S. 2A:170-76. The only justification so far held lawful by our courts is preservation of the mother's life. State v. Shapiro, 89 N. J. L. 319 (E. & A. 1916); State v. Brandenburg, 137 N. J. L. 124 (Sup. Ct. 1948). It may well be that when a physician performs an

> abortion because of a good faith determination in accordance with accepted medical standards that an abortion is medically indicated, the physician has acted with lawful justification within the meaning of our statute and has not committed a crime. See §207.11 Model Penal Code, comment 4, 153-154 (Tent. Draft No. 9 1959) and cf. Sanitary Vendors, Inc. v. Byrne, 40 N. J. 157 (1963)." 49 N. J. at p. 31.

Thus, the decision in *Gleitman* was adequately based upon common law principles of tort law, that is, that state social policy recognized no cause of action for failure to prescribe an abortion and damages were impossible of determination. No constitutional issue was reached nor had to be reached in order that the court render a determination. The majority of the court specifically refused to reach the issue of the criminal statute. In view of that fact, the instant matter, which was held to be controlled by *Gleitman,* rests upon an adequate state ground and therefore, this Court has no jurisdiction to grant certiorari.

II.

The issues presented are better directed to the legislatures of the various states for consideration.

The separation of the authority and responsibility of our judiciary and legislature was conceived by the framers of the Constitution as one of the vital elements in a smoothly functioning federal system. This original intent has been recognized by the Court as both salutary and limiting on the nature of its scope of review. As stated by Justice Frankfurter in *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 146 (1940):

> "But Courts are not charged with general guardianship against all potential mischief in the complicated tasks of government. The present case makes timely the remainder that 'legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.'"

Moreover, where the task is more in the nature of refashioning a statute, as in the instant case where petitioners ask that the right to therapeutic abortions be written into the New Jersey statute, the Courts agree that such an undertaking is more "consonant with the task of a congressional committee than with judicial construction." *Federal Trade Commission* v. *Mandel Bros.*, 359 U. S. 385, 390 (1959).

Recently the oft repeated reluctance to enter fields better handled by the Legislature was again voiced in *England* v. *Louisiana State Board of Medical Examiners*, 246 F. Supp. 993 (E. D. La. 1965), aff'd per curiam, 384 U. S. 885 (1966). That case involved whether the State Medical Board of Medical Examiners could enforce certain licensing provisions of the State Medical Practice Act against certain chiropractors practicing within the state. The trial court sustained the Medical Board's determination that the plaintiffs had not complied with the act since they had not graduated from an accredited medical school.[11]

The Court affirmed the judgment below and stated with particular pertinence to the instant case:

> "It may well be that chiropractic is a useful profession and that the requirement of a medical education for chiropractors is not in the public inter-

[11] The trial court found in favor of defendant on the basis of a prior state court decision.

> est. But the balancing of the advantages and disadvantages of this requirement is for the legislature." 246 F. Supp. at p. 997.

See also *Gleitman* v. *Cosgrove, supra* (concurring opinion by Francis, J.); *Dixon* v. *Gassert,* 26 N. J. 1, 9, 138 A. 2d 14 (1958); *Downing* v. *Stewart,* 85 N. J. Super. 62, 203 A. 2d 724 (App. Div. 1964); *Tinsman* v. *Parsekian,* 65 N. J. Super. 217, 221, 167 A. 2d 407 (App. Div. 1961).

As noted in respondents' brief in the Appellate Division and in the Supreme Court of New Jersey, it is obvious the New Jersey Legislature has taken careful consideration of the issue of abortion and has begun to act.[12] As noted in the preamble to a concurrent resolution of the New Jersey Legislature creating a commission to study the New Jersey Statutes relating to abortion and prescribing its powers and duties:

> "Whereas it is a legislative responsibility to reevaluate the existing statutes on abortion to determine whether they adequately protect the public health and welfare and promote effective law enforcement. . . .[13]

Moreover, as the survey of the Association for the Study of Abortion, Inc., indicates, many other states have undertaken similar consideration and reform.[14]

This being, therefore, a problem best considered and resolved by the legislature, the Court should decline to grant certiorari in this matter.

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[12] See Appendix to Respondents Brief p. 1a-3a.

[13] See Appendix to Respondents Brief p. 1a.

[14] See Appendix to Respondents Brief p. 4a-11a.

III.

The case before the Court in no way conflicts with prior decisions of this Court.

Petitioner argues that the present litigation either conflicts or should be controlled by the decision in *Griswold* v. *Connecticut,* 381 U. S. 479 (1965). Although petitioners have alluded to this point, respondents wish to stress that the decision in *Gleitman* v. *Cosgrove, supra,* and the instant matter which relied on that case, in no way rested upon the legal effect of New Jersey's Abortion Law. Justice Proctor in the majority opinion pointed out most clearly that the court did not consider the question of whether the abortion plaintiffs sought would have been illegal. Moreover the Court stated:

> "It may well be that when a physician performs an abortion because of a good faith determination in accordance with accepted medical standards that an abortion is medically indicated, the physician has acted with lawful justification within the meaning of our statute and has not committed a crime." 49 N. J. at p. 31.

Therefore, *Griswold,* which held that the *enforcement of a statute* prohibiting the dissemination of contraceptive information to married couples was unconstitutional, is not applicable to the instant case. The enforcement of a statute is not the issue in the present matter, for it was decided upon traditional concepts and principles of the common law of negligence. Consequently the holding of *Griswold* in no way conflicts or requires this Court's consideration of the present matter.

Griswold is not applicable for another basic reason. The majority in that decision found that the enforcement of the

Connecticut statute violated certain "fundamental rights of marital privacy." Reference was made to the original plea by James Madison and Mr. Justice Story's analysis of the Ninth Amendment. From these references it is clear that Madison desired to make certain that fundamental rights, not enumerated in the Bill of Rights, would not be construed as being taken away from the people. The present case differs in two respects to the acknowledged sanctity of marital privacy recognized in Madison's time as well as the present.

The right petitioners seek to assert is not and can not be construed to come within these *fundamental* rights recognized in *Griswold*. In fact, the reason why the New Jersey Supreme Court found no cause of action on the part of the parents in *Gleitman* was that what they were seeking contravened all notions of life and liberty.

> "It is basic to the human condition to seek life and hold on to it however heavily burdened. If Jeffrey could have been asked as to whether his life should be snuffed out before his full term of gestation could run its course, our felt intuition of human nature tells us he would almost surely choose life with defects as against no life at all. 'For the living there is hope, but for the dead there is none.'" 49 N. J. at p. 30.

Rather than seeking a fundamental right as in *Griswold* petitioners here seek damages for not being given the opportunity to snuff out their child's fundamental right, his life. See *Griswold* v. *Connecticut, supra,* at p. 493. Such a claim is clearly beyond the holding, rationale and intendment of *Griswold.*

Furthermore it is apparent that what petitioner now seeks to claim as a fundamental right, was not envisaged

as much by Madison in the Ninth Amendment, since at that time the common law also made abortion a crime.[15] Without doubt, the fundamental rights Madison sought to protect would not have included the right here asserted by petitioner.

Finally the opinions of Justice Douglas and Justice Goldberg and Justice Brennan and the Chief Justice in *Griswold* cited Justice Douglas' dissenting opinion in *Poe* v. *Ullman,* 367 U. S. 497 (1961). In that case, Justice Douglas indicates that certain human rights emanate from the specific rights set forth in the first eight amendments. However, Justice Douglas was also quick to point out that even the "family is not beyond regulation" and "the right of privacy most manifestly is not an absolute." *Poe* v. *Ullman, supra,* at p. 552.

And Justice Douglas recognized the State's rightful concern with its citizens' moral welfare. In that context his words are most particularly pertinent to the instant matter:

> "Certainly Connecticut's judgment is no more demonstrably correct or incorrect than are the varieties of judgment expressed in law, on marriage and divorce, on adult consensual homosexuality, *abortion,* and sterilization or euthanasia and suicide. If we had a case before us to decide simply and in the abstract, whether the moral judgment implicit in the application of the present statute to married couples was a sound one, the very controversial nature of these questions would, I think, require us to hesi-

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[15] At common law the crime was not committed unless the child was quick within the mother's womb when the abortion was committed, approximately 14-20 weeks. See Annotation §207.11 Tentative draft, Model Penal Code (1959) 148.

tate long before concluding that the Constitution precluded Connecticut from choosing as it has among these various views. *Poe* v. *Ullman, supra,* at p. 547.

And yet petitioner is asking this Court to review in the abstract the moral judgment of the New Jersey Legislature which is precisely what Justice Douglas thought the Court should not do. Only the pleadings were before the Trial Court below. Neither the Trial Court or the Supreme Court in *Gleitman* ruled on the basis of the abortion statute. Consideration of the constitutionality of that statute on this record could only be done in the abstract. For the reasons set forth above, the Court should decline to do so.

CONCLUSION

For the reasons outlined above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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[APPENDICES FOLLOW]

APPENDIX A

Assembly Concurrent Resolution No. 24

STATE OF NEW JERSEY

Introduced February 13, 1968

By Assemblymen CRANE, HOLLENBECK, COSTA, DE KORTE, APY, THOMAS, KALTENBACHER and SELECKY

A CONCURRENT RESOLUTION creating a commission to study the New Jersey Statutes relating to abortion and prescribing its powers and duties.

WHEREAS, The high rate of illegal abortions constitutes a serious law enforcement and public health and safety problem;

WHEREAS, Critics of our abortion laws contend that they are unduly restrictive and have a tendency to force persons seeking to have such operations performed to fall prey to the unscrupulous and frequently unskilled abortionist, with possible tragic consequences;

WHEREAS, It is imperative that our statutes in this area operate to effectively prevent resort to illegal abortions; and

WHEREAS, It is a legislative responsibility to re-evaluate the existing statutes on abortion to determine whether they adequately protect the public health and welfare and promote effective law enforcement; now, therefore,

BE IT RESOLVED *by the General Assembly of the State of Jersey* (*the Senate concurring*):

1. There is hereby created a commission to consist of 9 members, to be appointed from the membership of the

Senate by the President thereof, no more than one of whom shall be of the same political party, and 2 to be appointed from the membership of the General Assembly by the Speaker thereof, no more than one of whom shall be of the same political party, and 5 to be appointed by the Speaker of the General Assembly and President of the Senate acting jointly and in the following manner: one representative of the County Prosecutor's Association of New Jersey, one representative of the Medical Society of New Jersey, and three clergymen of [different] faiths. The members of the commission shall serve without compensation. Vacancies in the membership of the commission shall be filled in the same manner as the original appointments were made.

2. The commission shall organize as soon as may be after the appointment of its members and shall select a chairman from among its members and a secretary who need not be a member of the commission.

3. It shall be the duty of said commission to study our statutes relating to abortion and the problem of illegal abortions.

4. The commission shall be entitled to call to its assistance and avail itself of the services of such employees of any State, county or municipal department, board, bureau, commission or agency as it may require and as may be available to it for said purpose, and to employ such stenographic and clerical assistants and incur such traveling and other miscellaneous expenses as it may deem necessary, in

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EXPLANATION—Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

order to perform its duties, and as may be within the limits of funds appropriated or otherwise made available to it for said purposes.

5. The commission shall have all the powers provided by the provisions of chapter 13 of Title 52 of the Revised Statutes.

6. The commission may meet and hold hearings at such place or places as it shall designate during the sessions or recesses of the Legislature and no later than January 31, 1969, shall report its findings and recommendations to the Legislature, accompanying the same with any legislative bills which it may desire to recommend for adoption by the Legislature.

APPENDIX B

Bills Regulating the Performance of Abortion, Introduced in the 1969 Legislative Sessions

A Summary Report Prepared by the Association for the Study of Abortion, Inc.

ALABAMA

Session convenes May 13, 1969.

ALASKA

No bill.

ARIZONA

SB 69. ALI* (plus, "or the woman was unwed and had not reached sixteen years of age at the time of conception,").

HB 32. ALI (plus, "or the woman was unwed and had not reached sixteen years of age at the time of conception,").

HB 172. ALI.

ARKANSAS

Act 61. New law, ALI—("health"—does not specify physical and mental, four-month residency).

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* Bills so identified include the following indications for lawful abortion (the wording varies): 1. to preserve the woman's life; 2. if the pregnancy endangers her physical or mental health; 3. if there is risk the child, if born, would be abnormal; 4. if the pregnancy resulted from rape or incest.

Appendix B

CALIFORNIA

No bill (new law adopted 1967).

COLORADO

HB 1245. A bill which has as its objective diluting the effectiveness of the 1967 ALI-type law. Apparently does not have much chance of passage.

CONNECTICUT

HB 5490. ALI (plus "that the continuance of a pregnancy, resulting from credible evidence of rape or incest, may constitute a threat to the mental or physical health of the patient"; "No therapeutic abortion shall be performed . . . unless the patient has been a resident of the state of Connecticut for four months or unless the pregnancy occurred while the patient was a resident of this state.")

DELAWARE

No bill.

FLORIDA

HB 11. ALI.

GEORGIA

No bill (new law adopted 1968).

HAWAII

HB 61. ALI.

HB 107. ALI.

Appendix B

HB 204. Licensed physician; licensed hospital.*

IDAHO

No bill.

ILLINOIS

HB 634. Licensed physician; licensed hospital or other licensed medical facility.

INDIANA

No bill.

IOWA

HF 261. ALI.

HF 202. ALI.

SF 502. Provides that abortions may be done only to preserve the woman's health.

KANSAS

SB 9. Licensed physician; licensed and accredited hospital. (Amended to ALI—passed).

KENTUCKY

Next session January, 1970.

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* The wording of bills so identified varies, but, in general they provide that abortions may be performed only by licensed physicians and, where noted, they provide that abortions must be performed in licensed and accredited hospitals.

Appendix B

LOUISIANA

Session convenes May 12, 1969.

MAINE

HP 602. ALI.

MARYLAND

No bill. (New law adopted 1968.)

MASSACHUSETTS

HB 3362. ALI.

MICHIGAN

SB 288. Licensed physician; licensed hospital.

SB 287. ALI.

MINNESOTA

SF 998. Licensed physician (on approval of five-man hospital committee); licensed hospital.*

SF 1025. Licensed physician; licensed hospital.

MISSISSIPPI

No bill.

MISSOURI

SB 206. ALI (minus mental health).

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* Amended to include the phrase, "if the abortion is performed because of medical indications."

Appendix B

MONTANA

No bill.

NEBRASKA

No bill.

NEVADA

AB 259. Licensed physician.

AB 229. ALI (plus "Continuation of the pregnancy may threaten the life of the woman or seriously impair her health and the physician makes such determination after considering the total actual and reasonably foreseeable environment of the woman . . ."). AB 155. ALI (minus mental health; plus provision that patient must petition a district court for permission to have an abortion).

NEW HAMPSHIRE

HB 77. ALI.

NEW JERSEY

Information on this session not yet available.

NEW MEXICO

HB 207. New law—ALI—effective date June 22, 1969.

NEW YORK

A 1061-A. Repeal.

A 1310. Repeal.

S 2857. Repeal.

Appendix B

A 3958. Licensed physician.

A 3473. ALI (plus "the pregnancy occurred while the female was unmarried and fifteen years of age or less" and "the pregnancy of the woman occurred while the woman was declared to be a mentally disabled or incompetent person as defined in the mental hygiene law.") Defeated in the Assembly.

S 3500. ALI (plus, "such female has a severe, permanent and incapacitating physical or mental condition which would render her incapable of caring for the child, if born . . ." and "the pregnancy commenced while the female was unmarried and under sixteen years of age, and is still unmarried . . .").

A 2323. ALI (plus, "such female has a permanent physical or mental condition which would render her incapable of caring for the child, if born . . ."; "the pregnancy commenced while the female was unmarried and under eighteen years of age, and is still unmarried . . ."; "where the female is over forty years of age . . ."; and "where the female already has four living children . . .".

A 240. Life, rape, incest, "the pregnancy occurred while the female was thirteen years of age or less . . ." and "that the pregnancy occurred while the woman was certified as a mentally ill person or a mental defective, as defined in the mental health law."

North Carolina

No bill. (New law adopted 1967.)

North Dakota

HB 319. ALI.

Appendix B

OHIO

HB 71. ALI.

OKLAHOMA

No bill.

OREGON

HB 1311. Licensed physician.

SB 182. Licensed physician.

SB 193. ALI (minus rape and incest provisions, plus "or that the pregnancy resulted from felonious intercourse").

PENNSYLVANIA

No bill.

RHODE ISLAND

1400. ALI (four-month residency requirement).

H 1401. ALI (minus rape and incest; four-month residency requirement.)

H 1402. Rape and incest only indications; four-month residency requirement.

SOUTH CAROLINA

S 32. ALI ("health"—does not specify physical and mental).

SOUTH DAKOTA

No bill.

Appendix B

TENNESSEE

No bill.

TEXAS

HB 323. ALI (woman "is a resident of this state, or became pregnant in this state; or has resided in this state for a period of four months prior to the date of the proposed abortion.").

UTAH

SB 116. ALI.

VERMONT

H 199. ALI ("health"—does not specify physical and mental).

VIRGINIA

Next regular session January, 1970.

WASHINGTON

HB 312. Licensed physician.

W. VIRGINIA

No bill.

WISCONSIN

AB 33. Repeal.

WYOMING

No bill.